Supreme Court, U. S.
FILED
JUN 8 1977
MICHAEL RODAK, JR., CLERK

No. 76-1747

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William J. Cooney
1104 Georgia Bank Bldg.
Augusta, Georgia 30902

Stephen E. Silver
2333 N. Central Avenue
P. O. Box 13528
Phoenix, Arizona 85002

Counsel for Petitioner

I N D E X

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement	9
Reasons for granting the petition	12
Conclusion	30
Certificate of service	31
Appendix A	1a
Appendix B	6a
Appendix C	8a
Appendix D	10a

CITATIONS

Cases:

Fleming v. Commissioner, T.C. No. 267-76	26
Gelbard v. United States, 408 U.S. 41	19,28
In re Grand Jury, J. R. Simplot Co. v. United States District Court, No. 76-1893, 76-1995	18

Cases -- Continued: Page

James v. McKeever, 73-2 U.S.T.C. ¶ 16,119 14

Schildcrout v. McKeever, CIV 73-666 PHX WEC, appeal docketed, No. 76-2625, 76-2794 (oral argument, June 2, 1977) ... 26

United States v. Bisceglia, 420 U.S. 141 19

United States v. Donovan, 45 U.S.L.W. 4115 16

United States v. Giordano, 416 U.S. 505 22,23

United States v. Iannelli, 477 F.2d 991, aff'd on other grounds, 420 U.S. 770 13

United States v. Marion, 535 F.2d 697 28,29,30

Statutes:

18 U.S.C. § 2 10

§ 371 10

§ 1955 10

§ 2510(7) 3,13,26

§ 2515 .....3,13,14,19,20, 23,24,25,26

§ 2517 ..... 2,4-6,13, 14,19,26,27,29

Statutes -- Continued: Page

18 U.S.C. § 2518(10)(a) 7,13,22, 23,24,25

Ga. Code Ann. § 26-2301 28-29

Miscellaneous:

Fed. R. Crim. P. 6(e) 29

Hearings on Controlling Crime Through More Effective Law Enforcement, Subcomm. on Crim. Law & Proc., S.Comm. on Judiciary, 90th Cong., 1st Sess. 508,869 16

114 Cong. Rec. 11189 (1968) 15

114 Cong. Rec. 14751 (1968) 17

S.Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) 21,24

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, John Fleming, as Executor of the Estate of Robert W. Best, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 23, 1977.

OPINION BELOW

The opinion of the court of appeals (App. A, infra) is reported at 547 F.2d 871.

JURISDICTION

The judgment of the court of appeals (App. B, infra) was entered on February 23, 1977. A timely petition for rehearing, with a suggestion for a rehearing en banc, was denied on March 14, 1977. (App. C, infra) This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 2517 permits the disclosure of wiretap communications and evidence derived therefrom to IRS revenue agents for the purpose of determining civil tax liability.

2. Whether under 18 U.S.C. § 2515, wiretap communications, including information derived therefrom, is admissible in evidence in a civil tax proceeding.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

2510. Definitions

As used in this chapter--

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses. . .

2515. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications

Whenever any wire or oral communication has been intercepted, no part of

the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

2517. Authorization for Disclosure and Use of Intercepted Wire or Oral Communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent

that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this chapter, may disclose the contents of that communication or such derivative evidence while

giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communication relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be

used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

2518. Procedure for Interception of Wire or Oral Communications

(10)(a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of

the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

STATEMENT

Prior to November 10, 1972, the FBI made an investigation of a wagering operation being conducted in the area of Richmond County, Georgia. During the course of the investigation, wiretap authorizations were obtained by the FBI which resulted in the interception and monitoring of telephone conversations between persons engaged in the gambling operation. As a result of information obtained from the wiretap, the FBI obtained search warrants which were executed in raids conducted in several locations in Richmond County on November 10, 1972. The execution of the search warrants resulted in seizure by the FBI of certain physical evidence.

On April 30, 1973, indictments were returned in the United States District Court for the Southern District of Georgia. The indictments charged Robert W. Best and others with violations of 18 U.S.C. §§ 2, 371 and 1955.

Prior to the return of the indictments, information developed from the intercepted communications was forwarded by the United States Attorney's Office and the FBI to IRS special agents. The IRS special agents in turn disclosed this information through channels to an IRS revenue agent who prepared assessments for the periods beginning in January 1969 through November 1972, inclusive, for wagering excise taxes and interest thereon, against Robert W. Best in the amount of $741,093.49.

On September 27, 1973, Robert W. Best pleaded guilty to two counts of the indictment. At the time of accepting the plea,

some testimony was given in open court concerning both the contents of the telephone conversations and the information developed from the intercepted communications.

In January 1974, additional information developed from the intercepted communications was forwarded, at the direction of the United States Attorney's Office, to IRS special agents. The IRS special agents in turn disclosed the information through channels to an IRS revenue agent who prepared assessments for the periods beginning in January 1967 through December 1968, inclusive, for wagering excise taxes and interest thereon against Robert W. Best in the amount of $482,118.22.

Robert W. Best died on April 29, 1974. A short time thereafter, an action was filed by his Executor, John Fleming, in the United States District Court for the Southern

District of Georgia, Augusta Division, seeking a refund of excise wagering taxes paid under protest by Robert W. Best prior to his death. The Government counterclaimed. A jury verdict in the amount of $967,902.58 was awarded in favor of the Government and judgment entered accordingly.

The court of appeals affirmed the district court's evidentiary ruling that the wiretap communications lawfully intercepted, including evidence derived therefrom, by the FBI was admissible in the civil tax trial. However, the court of appeals found, absent the admissibility of that evidence, the judgment in favor of the Government could not be sustained.

REASONS FOR GRANTING THE PETITION

1. The decision below conflicts with the decisions of other courts of appeal and district courts, as well as the Supreme

Court, as to the proper interpretation and interrelationship of 18 U.S.C. §§ 2510(7), 2515, 2517, and 2518(10)(a).

The court of appeals' holding in this case, while recognizing that an IRS revenue agent is not an "investigative or law enforcement officer" as that term is defined in 18 U.S.C. § 2510(7), nevertheless permitted the revenue agent to use, as the sole basis for computing the tax assessments, information developed from the intercepted wiretap communications. As a result of this holding on this point, there is now a conflict with the Third Circuit opinion in United States v. Iannelli, 477 F.2d 991, 1001 (C.A. 3, 1973), aff'd on other grounds, 420 U.S. 770 (1975), which found that IRS revenue agents are "investigative or law enforcement officers" within the meaning of 18 U.S.C. § 2510(7).

The District Court of Arizona in an unreported decision, James v. McKeever, 73-2 U.S.T.C. ¶ 16,119 (D.Ariz., October 10, 1973) held that IRS agents are not an "investigative or law enforcement officer" under the pertinent provisions of 18 U.S.C. §§ 2515 and 2517 and as such, barred from receiving and using information derived from a wiretap for purposes of making a tax assessment.

2. The court of appeals' underlying rationale is contrary to congressional intent as expressed in the statutory scheme envisioned when enacting the Omnibus Crime Control and Safe Streets Act of 1968.

A perusal of the preamble to the Omnibus Crime Control and Safe Streets Act of 1968 evidences congressional intent for the statutory exclusion from evidence when there has been an unauthorized disclosure.

Section 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

* * *

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings. 114 Cong. Rec. 11189 (1968) (Emphasis added.)

Senator McClellan, chairman of the committee which reported Title III to

Congress, stated:

> I would not want any loose administration of this law.
>
> But [would] have it very strictly observed. It is not to become a catchall for promiscuous use. I want to see this law strictly observed with the courts adhering to the spirit and intent of it in granting the orders.
>
> I think it ought to be tight, very definitely as free from loopholes as it can possibly be made. . . [Hearings on Controlling Crime Through More Effective Law Enforcement, Subcomm. on Crim. Laws and Proc., S.Comm. on Judiciary, 90th Cong. 1st Sess., 508, 869.]

The strict construction to be accorded the statutory scheme was recognized by Chief Justice Burger in United States v. Donovan,

45 U.S.L.W. 4115, 4123 (1977):

> Congress drafted this statute with exacting precision. As its principal sponsor, Senator McClellan, put it: "A bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't'. . . " 114 Cong. Rec. 14751 (1968).
>
> Under these circumstances, the exact words of the statute provides the surest guide to determining Congress' intent and we would do well to confine ourselves to that area.

In light of the legislative history, the statement of the court of appeals in concluding that it was not necessary to interpret what it found to be "poorly drafted," "ambiguous" and "circular" statutes, sidestepped the issue which required resolution

in determining if the intercepted communications and evidence derived therefrom could be used by IRS revenue agents in determining civil tax liability.

In a recent opinion of the Ninth Circuit, In re Grand Jury, J. R. Simplot Co. v. United States District Court, No. 76-1893, 76-1995 (C.A. 9, May 2, 1977), the IRS was denied access to grand jury information. As the Ninth Circuit recognized, the grand jury's single purpose is to investigate criminal acts, not possible civil tax liability. Accordingly, the Ninth Circuit found that disclosure of grand jury evidence to the IRS for civil tax purposes was subject to a motion to suppress in a civil tax proceeding.

Like a grand jury, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, was enacted

solely to combat crime, not as a device to supplement existing statutes which give the IRS a broad arsenal for investigating civil tax liabilities. United States v. Bisceglia, 420 U.S. 141. Accordingly, if an IRS revenue agent is not an "investigative or law enforcement officer," then under the pertinent provisions of 18 U.S.C. §§ 2515 and 2517, wiretap communications and evidence derived therefrom may not be received in evidence in any trial since its disclosure would be in violation of the wiretap chapter.

3. Recent Supreme Court opinions express ongoing concern that has been a source of continuing controversy over the interpretation to be accorded various provisions of the wiretap chapter.

In Gelbard v. United States, 408 U.S. 41, the Court held that grand jury witnesses are entitled to invoke the prohibition against

the use of information discovered in an illegal wiretap (18 U.S.C. § 2515) as a defense to contempt charges brought against them for refusing to testify. In discussing the legislative history of the wiretap chapter, the Court recognized that "although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." 408 U.S., at 48.

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents

> should be prohibited . . . Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provisions must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation. S.Rep. No. 1097, 90th Cong., 2d Sess. 66,69 (1968) (Emphasis added.)

If, as Senator McClellan said, the words of the statute "provide the surest guide," it is difficult to see how one can quarrel with the proposition that an unauthorized

disclosure constitutes an unauthorized use which results in denying the perpetrator the fruits of his unlawful actions in a civil tax proceeding.

In United States v. Giordano, 416 U.S. 505, in a unanimous opinion, the Court held, inter alia, that under § 2518(10)(a)(i), the words "unlawfully intercepted" are not limited to constitutional violations, but the statute was intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. Id., at 524-528. Consequently, a motion to suppress was granted because the Justice Department officer approving the application was not properly delegated to author-

ize the wiretap in the first instance.

The Court's observations at 524 are particularly relevant:

> The issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III;
>
> * * *
>
> Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if disclosure of that information would be in violation of this chapter." What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by section 2518(10)(a). . . .

The Court did not say that the stated grounds under § 2518(10)(a) must first be met

if an objection is made at trial under § 2515, for this question was not before the Court. The Court only said that if the grounds for a motion to suppress under § 2518(10)(a) is present, then the granting of the motion under that section is proper. Support for the conclusion that suppression as distinguished from evidentiary objection is limited to the grounds stated in § 2518 (10)(a) [Id., at 7-8] has its genesis in the Senate Report which accompanied Title III to Congress. It states:

> Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter and that section 2518(10)(a) together with section 2515 "applies to suppress evidence directly . . . or indirectly . . ." S.Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968).

As the court of appeals correctly concluded, the aggrieved party is not claiming a consitutional violation or failure to comply with subsections (i)-(iii) of 18 U.S.C. § 2518(10)(a), which would be grounds to suppress. Rather, the unauthorized disclosure to and use by the IRS revenue agents has been raised in the context of an evidentiary objection under the general provisions of 18 U.S.C. § 2515, which provides in pertinent part that the intercepted communications and evidence derived therefrom may not be received in evidence in any trial if disclosure of that information is in violation of the wiretap chapter. If an IRS revenue agent is not an "investigative or law enforcement officer" as that term is defined in 18 U.S.C.

§§ 2510(7) and 2517, a fortiori, there has been an unauthorized disclosure which is subject to the statutory exclusionary rule of 18 U.S.C. § 2515.

4. The decision below raises a significant and recurring issue concerning the application of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The court of appeals may be correct in its assertion that the pertinent statutes "is not a model of clarity." As evident from the cases previously cited, Title III requires immediate judicial clarification. The issue presented in this case is also pending in the Ninth Circuit, Harry Schildcrout v. Robert M. McKeever, CIV 73-666 PHX WEC (D.Ariz. 1976), appeal docketed No. 76-2625, 76-2794 (C.A.9, June 24, 1976) (oral argument, June 2, 1977), and the United States Tax Court, John Fleming,

Executor, Estate of Robert W. Best v. Commissioner, No. 267-76. Without a final resolution of this issue, the uncertainty that has developed concerning the use of wiretap evidence by the IRS in a civil tax case will continue and could result in additional conflicting decisions.

5. The court of appeals concludes its decision by stating that notwithstanding recognition of statutory ambiguities, appropriate and proper disclosure orders were entered by the trial court in accordance with 18 U.S.C. § 2517(5).

Under 18 U.S.C. § 2517(5), when "offenses other than those specified in the order of authorization" is found, such evidence can only be disclosed with the consent and approval of the court. Central to the disclosure of such evidence is the restriction that its use be limited to the specific "offense" described in the order. In

addition, the judge authorizing the disclosure must make a specific finding that the communications were "otherwise intercepted in accordance with the provisions of [Title III]." United States v. Marion, 535 F.2d 697, 707 (C.A.2, 1976); c.f., Gelbard v. United States, supra.

No such disclosure orders were entered by the trial court either before or after the tax assessments were made which would permit use for civil tax purposes. The only disclosure orders entered, which were made a part of the record by stipulation (App. D), are dated February 18, 1974 and June 5, 1974, which is long after the tax assessments were made.

The February 18, 1974 disclosure order entered by the Honorable Anthony A. Alaimo, who was the trial judge, authorized disclosure and use only as it related to the criminal offense of bribery, Title 26, Criminal

Code of Georgia (Ga. Code. Ann. § 26-2301). The June 5, 1974 disclosure order was entered by the Honorable Alexander A. Lawrence under Fed. R. Crim. P. 6(e). This latter order did not indicate any specific offense, but it was limited to "criminal activity." Moreover, the June 5, 1974 order did not properly authorize the disclosure to and use by IRS revenue agents because the approving judge did not make an explicit finding that the contents were "otherwise intercepted in accordance with the provisions of [Title III]." Id. Finally, the IRS cannot use for civil tax purposes information disclosed to them from a grand jury. See discussion and citations at 18-19.

One's civil tax liability to the public fisc is not an "offense" under 18 U.S.C. § 2517(5). Consequently, any disclosure and hoped for use of wiretap evidence for any purpose other than the specific

"offense" described in the disclosure order is not permissible. Id., at 700, 703,706.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

STEPHEN E. SILVER
2333 N. Central Avenue
P. O. Box 13528
Phoenix, Arizona 85002

COUNSEL FOR PETITIONER

June 1977

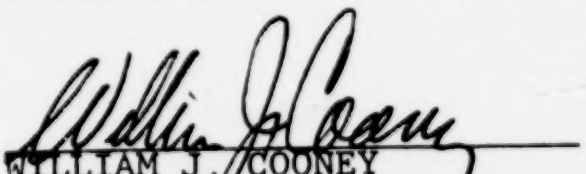
CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 1977, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Wade Hampton McCree, Jr.
The Solicitor General
Department of Justice
Constitution Avenue
Washington, D. C. 20530

Counsel for Respondent

I further certify that all parties required to be served have been served.



WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

Counsel for Petitioner

APPENDIX A

John FLEMING, as Executor of the Estate of Robert W. Best, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 76-3107
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Feb. 23, 1977.

The executor of estate of deceased taxpayer appealed from a judgment of the United States District Court for the Southern District of Georgia, at Augusta, Anthony A. Alaimo, Chief Judge, awarding Government additional taxes based on deceased's wagering activities. The Court of Appeals held that evidence of communications lawfully intercepted by FBI during duly authorized wiretap leading to criminal conviction of taxpayer was admissible in the civil action.

Affirmed.

1. Internal Revenue ⇐1883

Evidence of communications, lawfully intercepted by agents of the Federal Bureau of Investigation during duly authorized wiretap in investigation of wagering operation, leading to conviction of taxpayer for operating illegal gambling business, was admissible in subsequent civil action to collect wagering taxes. 18 U.S.C.A. §§ 2510 et seq., 2515, 2516, 2517.

2. Telecommunications ⇐492

Primary purpose of statute proscribing disclosure of information obtained from intercepted communication if disclosure of the information would be in violation of chapter is apparently to exclude evidence derived from illegal rather than legal wiretap; statute's main thrust is to exclude evidence the seizure of which was in violation of chapter not evidence the disclosure of which was or would be in violation of chapter. 18 U.S.C.A. § 2515.

3. Internal Revenue ⇐1883

Evidence derived from communications lawfully intercepted as part of bona fide criminal investigation that results in taxpayer's conviction may be properly admitted in civil tax proceedings, at least where evidence is already part of public record of prior criminal prosecution. 18 U.S.C.A. § 2510 et seq.

Appeal from the United States District Court for the Southern District of Georgia.

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

[1] The district court awarded the government $967,902.58 for taxes based on taxpayer Robert W. Best's wagering activities. On this appeal the taxpayer's sole basis for challenging the judgment below is that evidence of communications lawfully intercepted by agents of the Federal Bureau of Investigation during a duly authorized wiretap should not have been disclosed to revenue agents of the Internal Revenue Service and therefore was inadmissible in this civil action.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1977, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

We reject the taxpayer's argument and affirm the decision below.

I.

FBI agents were conducting an investigation of wagering operations in Richmond County, Georgia. The agents obtained authorization to intercept certain telephone conversations pursuant to the federal wiretap statute, 18 U.S.C. § 2510, *et seq.* The agents' actions concededly comported with all constitutional and statutory restrictions.

The investigation led to the indictment of the taxpayer and others for operating an illegal gambling business. In September 1973 the taxpayer pleaded guilty to two counts of the indictment. At the time the court accepted the pleas, testimony was given in open court concerning the contents of the intercepted telephone conversations.

Both before and after the guilty pleas and attendant testimony, FBI agents forwarded information developed from the intercepted communications to IRS special agents. The IRS special agents in turn disclosed the information, through channels, to IRS revenue agents. The revenue agents prepared the tax assessments on which the civil action at bar is based.

The taxpayer died, and his executor brought this action seeking a refund of wagering excise taxes already paid. The government counterclaimed, seeking the payment of additional taxes. The government introduced evidence of the intercepted communications. Absent that evidence, we would be unable to sustain the judgment given in the government's favor.

II.

The taxpayer argues, quite correctly, that the federal wiretap statute does not authorize the use of wiretapping to investigate civil tax liability. This argument, however, ignores the undisputed fact that the wiretaps here were part of the investigation of criminal wagering activities clearly among those crimes covered by the wiretap statute. See 18 U.S.C. § 2516. We do not understand the taxpayer to contend that the criminal investigation was merely a subterfuge to enable the agents to intercept communications for the purpose of bolstering their civil tax case. Indeed, in light of the criminal convictions of the taxpayer which resulted from the same wiretaps, the taxpayer would have a very difficult time substantiating such an argument.

The taxpayer argues further, however, that once having lawfully intercepted the telephone conversations as part of a criminal investigation, the government agents were not free to disclose the information they had obtained to IRS revenue agents. The taxpayer's argument rests on two premises: first, that the disclosures were not authorized by 18 U.S.C. § 2517, which places restrictions on the disclosure of information developed from wiretaps; and second, that the improper disclosure mandates exclusion of the evidence under 18 U.S.C. § 2515, which establishes the statutory exclusionary rule. Our analysis of the two statutory provisions makes us confident of only one conclusion: the statute is not a model of clarity. The statute provides no ready answer to the important issue of the extent to which information developed through wiretaps as part of criminal investigations can be disclosed to the Internal Revenue Service for use in civil tax proceedings. We decline to resolve the statutory ambiguities, for we find that whatever the exact scope of the statutory provisions, the evi-

dence was properly admitted under the circumstances here.

III.

We perceive only two substantial purposes that might be pursued by preventing the admission in civil tax proceedings of evidence lawfully seized as part of a criminal investigation. First, preventing the IRS from using such information might prevent the government from using criminal investigations as a subterfuge for developing information for civil tax proceedings. As indicated above, however, in this case the government actually obtained two criminal convictions of the taxpayer; the criminal investigation was no pretext.[1] The second possible purpose of excluding the evidence would be to prevent the government's law enforcement officers from disclosing lawfully seized evidence to Internal Revenue Service revenue agents. The rationale for such a limitation on the dissemination of lawfully seized evidence would be the privacy interest which a person retains in his or her communications even after they have been intercepted by a narrow category of government officials. But whatever the strength of that privacy interest in other circumstances, when the intercepted communications are already part of the public record of a criminal prosecution the privacy interest is weak and does not justify excluding the evidence.

[2] We therefore perceive no reason to exclude the lawfully seized evidence here, and we would order its exclusion only if the statute clearly required that result. The statute, however, does not do so. The statutory provision which mandates exclusion of certain evidence of intercepted communications is 18 U.S.C. § 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The provision is poorly drafted. Read literally, the provision is circular; it proscribes the reception into evidence (and thus the disclosure) of information the disclosure of which "would be in violation of this chapter." "Disclosure" apparently refers to disclosure at trial rather than disclosure among various departments of the government at some earlier point; otherwise, the statute would presumably refer to information the disclosure of which "has been" in violation of the chapter. At any rate, the provision should not be read in an overly literal fashion. The section's primary purpose is apparently to exclude evidence derived from illegal, rather than legal, wiretaps. The section's main thrust is therefore to exclude evidence

1. Under these circumstances we find no justification for applying a broad prophylactic rule excluding evidence in all proceedings other than those dealing with the crimes enumerated in § 2516. This conclusion, however, should not be read as an endorsement, in other situations, of a case-by-case, after-the-fact analysis of whether the original criminal investigation was a pretext. We note only that, whether or not such an analysis should be replaced by a prophylactic rule in other circumstances (an issue upon which we express no view), any such prophylactic rule need not be applied and the evidence need not be excluded when the original criminal investigation has resulted in conviction.

the *seizure* of which was in violation of the chapter, not evidence the *disclosure* of which was or would be in violation of the chapter. Indeed, the government argues that the section's sole application is to instances of illegal wiretaps.

But even if we were to accept the taxpayer's argument that § 2515 mandates the exclusion of evidence that has been unlawfully disclosed by one government agent to another, the taxpayer could prevail here only by establishing that § 2517 proscribes the disclosure of information seized in a lawful wiretap to IRS revenue agents. The section contains two provisions, however, which may authorize such disclosure. First, § 2517(2) provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

The disclosure by an investigative or law enforcement officer of the contents of an intercepted communication to IRS revenue agents may constitute "use" of such contents that is "appropriate to the proper performance of his official duties."

The second provision that may authorize the disclosure is § 2517(3):

> Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

This provision applies to civil as well as criminal proceedings[2] and apparently would have allowed the FBI agents to testify in the case at bar.[3] A reasonable interpretation of that authorization to give testimony may include the authorization to disclose the contents of the testimony before trial to the IRS revenue agents responsible for preparing the assessments on which the trial will be based.[4]

IV.

[3] Because of these statutory ambiguities, we must interpret the statute in light of its purposes. As we have indicated, excluding the lawfully seized evidence in this civil tax proceeding would serve no purpose. We therefore uphold

2. The statute originally applied only to "any criminal proceeding" but was amended in 1970 to include "any proceeding." Pub.L.No.91-452, Title IX, § 902(b), 84 Stat. 947. *See* H.Rep.No.91-1549, 1970 U.S.Code Cong. & Admin.News pp. 4007, 4036 (1970).

3. Such testimony may be received in the trial of matters other than those upon which the original wiretap authorization was based only "when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter." 18 U.S.C. § 2517(5). The application must be made "as soon as practicable." *Id.* The parties have stipulated that the trial court entered such orders here. (A.49).

4. The government does not attempt to rely upon § 2517(1), which authorizes certain disclosures to "investigative or law enforcement" officers. The government acknowledges that IRS revenue agents, unlike IRS special agents, are not "investigative or law enforcement officers" within the statutory definition, 18 U.S.C. § 2510(7).

the district court's refusal to exclude it. In so holding, we make no effort to define with greater precision the limitations imposed by the statute. We hold only that evidence derived from communications lawfully intercepted as part of a bona fide criminal investigation that results in the taxpayer's conviction may properly be admitted in a civil tax proceeding, at least when the evidence is already part of the public record of the prior criminal prosecution. The judgment below is affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

United States Court of Appeals

For the Fifth Circuit

No. 75-3107
Summary Calendar

D. C. Docket No. CA-174-65

JOHN FLEMING, as Executor of the Estate of Robert W. Best,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the

Southern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 23, 1977

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

March 14, 1977

Edward W. Wadsworth,
Clerk

Tele. 504-589-6514
600 Camp Street
New Orleans, LA 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-3107 - John Fleming, etc. v. USA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

BY: /s/ Susan M. Gravois
Deputy Clerk

/SMG

cc: Mr. William J. Cooney
Mr. A. Blenn Taylor, Jr.
Mr. Edmund A. Booth, Jr.
Mr. Scott P. Crampton

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

JOHN FLEMING, As Executor of the Estate of Robert W. Best,	)	
Plaintiff,	)	CIVIL ACTION NO. 174-65
v.	)	
UNITED STATES OF AMERICA,	)	APPEAL NO. 76-3107
Defendant.	)	

STIPULATION

The parties hereto, by and through their respective counsel, hereby stipulate and agree pursuant to Rule 10 of the Federal Rules of Appellate Procedure that the record on appeal in the above entitled cause be supplemented by inclusion of the Orders of February, 1974 and June, 1974, concerning release and disclosure of the transcripts of the intercepted telephone communications, said orders being the subject of Paragraphs 11 and 12 of Stipulation No. 3 entered into by the parties and which is included in the

Appendix at Pages 46-49, inclusive.

Stipulated this 24th day of November, 1976.

R. JACKSON B. SMITH, JR.
UNITED STATES ATTORNEY

/s/
Edmund A. Booth, Jr.
Assistant United States Attorney
Attorneys for Defendant

/s/
William J. Cooney
1104 Georgia Bank Building
Augusta, Georgia 30902
Attorney for Plaintiff

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

IN RE)
) No. _____
GRAND JURY PROCEEDINGS)

ORDER

Whereas an Investigative Grand Jury has been impanelled to sit in this district for the purpose of taking testimony and receiving docuemmts so as to investigate criminal activity occurring within this district, and;

Whereas minutes of the Grand Jury proceedings are being recorded and transcribed, and;

Whereas the United States of America has moved this Court for an Order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for disclosure of the minutes of the Grand Jury proceedings and documents received by the Grand Jury to certain federal investigative agencies, i.e., the Federal

Bureau of Investigation, the Internal Revenue Service, the Bureau of Alcohol, Tobacco and Firearms, and others, and;

Whereas it appears to the Court that disclosure of the minutes of the Grand Jury proceedings and documents received by the Grand Jury to these agencies is proper within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure, and good and just cause being shown, it is hereby,

ORDERED, ADJUDGED AND DECREED that in furtherance of the investigation now pending before the Grand Jury, the minutes of the Grand Jury proceedings and the documents received by the Grand Jury be disclosed to appropriate federal investigative agencies including, but not limited to the Federal Bureau of investigation, the Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms.

This 5th day of June, 1974.

/s/
Alexander A. Lawrence,
Chief Judge
United States District Court
Southern District of Georgia

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

IN THE MATTER OF AN APPLICATION)	
)	CRIMINAL
FOR AN ORDER AUTHORIZING USE OF)	ACTION
)	NO. 5640
INTERCEPTED WIRE COMMUNICATIONS)	

ORDER

Application under oath having been made before me for an Order pursuant to Title 18, U.S.C. § 2517(5), by the United States, through its attorney, R. Jackson B. Smith, Jr., United States Attorney, Southern District of Georgia, and an "investigative or law enforcement officer -- of the United States" as defined in Title 18, U.S.C. § 2510(7), said application having been authorized by the Attorney General of the United States, the Honorable William B. Saxbe, under the powers conferred on him by Title 18, U.S.C., § 2516, I find that:

1. On September 29, 1972, upon application of R. Jackson B. Smith, Jr., United

States Attorney, Southern District of Georgia, an Order was issued by Judge Anthony A. Alaimo, United States District Court, Southern District of Georgia, authorizing agents of the Federal Bureau of Investigation to intercept for a period of 15 days, wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 722-2468	Floyd Henderson 1461 Chestnut Street Augusta, Georgia

Telephone Numbers	Subscriber and Location
(404) 736-2609	Furman Devilius Kinard,Jr. 2418 Forest Park Road Augusta, Georgia

And, on October 20, 1972, upon application of R. Jackson B. Smith, Jr., United States Attorney, Southern District of Georgia, an order was issued by the Honorable Alexander A. Lawrence, Chief Judge, United States District Court, Southern District of Georgia, authorizing agents of the Federal Bureau of Investigation to intercept for a

period of 15 days wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 733-9578	Bob Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 733-6344	R. W. Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 722-6303	T. W. Best Room 23, 203 8th Street Augusta, Georgia
(404) 722-3998	Bruno Ward Janitorial 842 Greene Street Augusta, Georgia
(404) 798-2944	Frances Marian Seago 2128 Circle Drive (formerly Circular Drive) Augusta, Georgia
(404) 736-5700	David Chambers 1219 1/2 Raid Road Augusta, Georgia
(404) 736-7188	James A. Bagley 847 Lake Terrace Drive Augusta, Georgia

for the purpose of securing evidence that the above-named persons were committing offenses specified in Title 18, U.S.C. § 2516, to wit: offenses involving violations of Title 18, U.S.C. § 1955 and § 371.

2. During the authorized periods of interception, agents of the Federal Bureau of Investigation intercepted wire communications which, when considered together with other evidence subsequently obtained, gave indication of the commission of offenses other than those specified in the interception orders to wit: Title 26, Criminal Code of the State of Georgia, Ga. Code Ann., § 26-2301.

3. The communications mentioned in paragraph 2 above were intercepted incidentally and in good faith by agents of the Federal Bureau of Investigation in the course of authorized interceptions and accordingly, were "otherwise intercepted" in accordance with the provisions of Chapter 119 of Title 18, United States Code.

WHEREFORE, it is ordered pursuant to the provisions of Title 18, U.S.C., § 2517(5), that any person who has received, by any means authorized by Chapter 119 of Title 18,

United States Code, any information concerning wire communications or evidence derived therefrom, intercepted over telephone numbers: (404) 722-2468 and (404) 736-2609, pursuant to the order of Judge Anthony A. Alaimo, United States District Court, Southern District of Georgia, dated September 29, 1972; and intercepted over telephone numbers: (404) 733-9578, (404)733-6344, (404) 722-6303, (404) 722-3998, (404) 798-2944, (404) 798-0535, (404) 736-5700, and (404) 736-7183, pursuant to the order of Chief Alexander A. Lawrence, United States District Court, Southern District of Georgia, dated October 20, 1972; but relating to offenses other than those specified in said order, to wit: violations of Title 26, Criminal Code of the State of Georgia, Ga. Code Ann. § 26-2301, may disclose the contents of said communications and any evidence derived from such communication, while giving testimony under oath or affirmation in any

proceeding held under the authority of the United States or any state or political subdivision thereof; and further the tapes which resulted from the interceptions ~~might~~ may also be released for appropriate use in accordance with the provisions of Title 18, U.S.C., § 2517(5).

Done this 18th day of February, 1974.

/s/
ANTHONY A. ALAIMO
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

No. 76-1747

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1747

JOHN FLEMING, EXECUTOR OF THE
ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether information lawfully obtained by federal law enforcement officials by means of electronic surveillance in connection with a criminal investigation and admitted in evidence in a resulting criminal prosecution was likewise admissible in evidence in this subsequent civil tax refund suit for wagering taxes which were assessed on the basis of such information.

The pertinent facts are as follows: In connection with an investigation of illegal wagering activities in Richmond County, Georgia, FBI agents obtained court authorization to intercept certain telephone conversations pursuant to the federal wiretap statute, 18 U.S.C. 2510 *et seq.* It is undisputed that the agents complied

with all statutory requirements in obtaining the authorization and carrying out the interceptions. The investigation resulted in the indictment of decedent Robert W. Best and others for operating an illegal gambling business. In September 1973, Best pleaded guilty to two counts of the indictment. At the time the court accepted the guilty pleas, testimony was given in open court with respect to the contents of the intercepted telephone conversations (Pet. App. A, p. 2a).

Prior to and after the guilty pleas, FBI agents transmitted information gained from the intercepted conversations to special agents of the Internal Revenue Service. The special agents in turn disclosed the information to revenue agents, who thereafter issued wagering excise tax assessments which Best paid in part (Pet. App. A, p. 2a).

Following Best's death, his executor instituted this action in the United States District Court for the Southern District of Georgia seeking a refund of the wagering excise taxes. The government counterclaimed for the unpaid balance of the assessed taxes. In support of the assessments, the government introduced evidence of the intercepted wire communications. Petitioner moved to suppress the wiretap evidence, contending that the disclosure of such evidence to revenue agents was unlawful under the federal wiretap statute. The district court denied the executor's motion to suppress and the court of appeals affirmed *per curiam* (Pet. App. A, pp. 1a-5a).

The court of appeals correctly upheld the admissibility of the lawfully obtained wiretap evidence in this civil tax refund suit. As it observed, the federal wiretap statute (18 U.S.C. 2517(2) and (3)) authorizes disclosure of wiretap

information to revenue agents,[1] and the suppression remedy provided in 18 U.S.C. 2515 encompasses only evidence obtained from illegal wiretaps and not information derived from duly authorized wiretaps.[2] Moreover, 18 U.S.C. 2517 (3) explicity authorizes lawfully intercepted wiretap evidence to be disclosed "in any proceeding," and the legislative history shows that that provision was intended to permit introduction of such evidence "in civil actions." H.R. Rep. No. 91-5149, 91st Cong., 2d Sess. 59-60 (1970).

---

[1]An investigative or law enforcement officer who has lawfully obtained wiretap information may, under Section 2517(1), disclose such information to any other investigative or law enforcement officer "to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure," and, under Section 2517(2), may use such information "to the extent such use is appropriate to the proper performance of his official duties." While revenue agents (unlike special agents) of the Internal Revenue Service are not investigative or law enforcement officers within the meaning of Section 2510(7) (see Pet. App. A, p. 4a n. 4), disclosure of wiretap information by an investigative or law enforcement officer to revenue agents for civil tax assessment purpose is "appropriate to the proper performance of his official duties" under Section 2517(2) (Pet. App. A, p. 4a).

[2]Section 2515 provides for the exclusion of wiretap evidence "if the disclosure of that information would be in violation of this chapter." Disclosure of such information is unlawful only where the "information was obtained through the interception of a wire or oral communication in violation of [Section 2511(1)]." The suppression remedy of Section 2515 applies only to those situations described in Section 2518(10), *i.e.*, only where "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." See *United States* v. *Giordano*, 416 U.S. 505, 524-525; *United States* v. *Chavez*, 416 U.S. 562, 570-575; *United States* v. *Donovan*, No. 75-212, decided January 18, 1977. Contrary to petitioner's contention (Pet. 13), the decision below does not conflict with *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), affirmed on other grounds, 420 U.S. 770. There, the

However, the court did not find it necessary to base its decision on these grounds. Instead, it held that in any event the evidence in question was admissible because it was obtained as part of a bona fide criminal investigation and was already part of the public record in the prior criminal proceeding (Pet. App. A, p. 3a). This basis for the decision also was sound. Once evidence has been made part of the public record in a prior criminal prosecution, the defendant's privacy interest with respect to that evidence is substantially diminished if not wholly dissipated. Since the wiretap authorization statute does not require the exclusion of lawfully obtained evidence in a subsequent civil case, the evidence in this civil tax refund suit was properly admitted (Pet. App. A, p. 3a). Cf. *United States* v. *Janis*, 428 U.S. 433.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

---

court upheld criminal convictions based in part on evidence obtained through electronic surveillance, holding that the disclosure of the wiretap evidence to agents of the Internal Revenue Service was authorized under the wiretap statute, and that, in any event, the suppression remedy provided in the statute was available only in the event of an illegal interception.

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1747

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

William J. Cooney
1104 Georgia Bank Building
Augusta, Georgia 30902

Stephen E. Silver
P. O. Box 13528
Phoenix, Arizona 85002

Counsel for Petitioner

No. 76-1747

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

JOHN FLEMING, EXECUTOR OF THE
ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

William J. Cooney
1104 Georgia Bank Building
Augusta, Georgia 30902

Stephen E. Silver
P. O. Box 13528
Phoenix, Arizona 85002

Counsel for Petitioner

I N D E X

Page

Petitioner's Reply Memorandum 1

Certificate of Service 11

Appendix A 1a

Appendix B 1b

CITATIONS

Cases:

Gelbard v. United States,
408 U.S. 41 7

McNabb v. United States,
318 U.S. 332 7

United States v. Calendra,
414 U.S. 338 7

United States v. Chavez,
416 U.S. 562 5

United States v. Donovan,
97 S.Ct. 658 . . . . . 5, 6

United States v. Giordano,
416 U.S. 501 5

United States v. Janis,
428 U.S. 433 . . . . . 9, 10

Statutes:

18 U.S.C. 2510(7). 3

2517 7

2517(1). 4, 5

Statutes -- Continued: Page

18 U.S.C. 2517(2) 3, 5, 9-10

2517(3) 8

2517(5) 5

2518 6

2518(10) 5

Miscellaneous:

S.Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969) 9

[1970] U. S. Code Cong. & Ad. News, 4010 8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1747

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

---

1. The question framed by the Government is misleading for it infers the specific information obtained by the IRS was evidence that became part of the public record at the time Robert W. Best entered his guilty plea on September 27, 1973. When the district court accepted the plea on September 27, 1973, the only testimony given in open court related to the general contents of the intercepted

conversations that had occurred during the period of two wiretaps conducted between September 29, 1972 and October 16, 1972, and October 20, 1972 and November 8, 1972. (Pet. App. A, p. 2a; App. A, infra; App. B, infra, p. 5b)

The jeopardy assessment made on May 3, 1973, in the amount of $741,093.49, for the periods beginning in January 1969 through November 1972, was prior to the FBI agent testifying in open court. Furthermore, since the FBI agent's testimony in open court was limited only to the general contents of intercepted conversations during the period of the wiretaps, the assessment for the periods beginning in January 1967 through December 1968, made subsequent to September 27, 1973, was not based upon the testimony given in open court. Accordingly, the second part of the

question framed by the Government which states "wagering taxes . . . were assessed on the basis of such information" (Mem., p. 1) is incorrect.

2. In footnote 1 of its Memorandum, the Government contends that although the revenue agent who was furnished the wiretap information to make the jeopardy assessment is not an "investigative or law enforcement officer" as that term is defined in 18 U.S.C. 2510(7), the disclosure from the FBI to an IRS special agent and in turn by the IRS special agent to the revenue agent was proper because under 18 U.S.C. 2517(2), it was "appropriate to the proper performance of his [IRS special agent] official duties." If such interpretation of the wiretap chapter is embraced, then one must conclude that the disclosure limitation can be easily circumvented by showing a lawful receipt of

such information by an "investigative or law enforcement officer" who can in turn disclose it to anyone for any purpose, as long as the disclosure would be "appropriate to the proper performance of his official duties."

The congressional intent as it related to the right of privacy was to superimpose a limitation upon any disclosure and use by persons who did not fall within the initial "investigative and law enforcement officer" definition. Specifically, 18 U.S.C. 2517(1), which was not cited by the Government, provides that any law enforcement or investigative officer may only disclose such contents "to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." The clear import of

18 U.S.C. 2517(1), which must be read in tandem with the isolated quote of the Government from 18 U.S.C. 2517(2) as well as the other provisions of that section, is that one who has lawful receipt of the contents of a wiretap is limited to its use, unless an appropriate court order is obtained under the provisions of 18 U.S.C. 2517(5) to release such information to non-investigative or law enforcement officers.

3. In footnote 2, the Government contends that the exclusion from evidence of wiretap evidence is limited only if one of the three conditions set forth in 18 U.S.C. 2518(10) has occurred.

The Supreme Court in United State v. Donovan, 97 S.Ct. 658; United States v. Giordano, 416 U.S. 505; and United States v. Chavez, 416 U.S. 562, has used the "substantive" vs. "procedural" nomenclature in determining whether the statutory

exclusion should be imposed pursuant to 18 U.S.C. 2518. However, in Donovan, the Court indicated very precisely that if there was an intentional violation of the wiretap statute, the decisions in these cases would have been different. 97 S.Ct., at 672, n.23; 673, n.26.

In the instant case, there was an intentional violation by the FBI and the IRS special agent in disclosing the wiretap evidence for the purpose of assisting the revenue agent in determining civil tax liability. Since Donovan indicates that wiretap information will not be received in evidence if there is an intentional violation of the wiretap chapter, the clear implication is that, consistent with the intent of Congress, the judicially fashioned exclusionary rule, aimed at deterring violations of constitutional rights, would be imposed under the Court's general

supervisory powers, McNabb v. United States, 318 U.S. 332, 340, for one of the central purposes of the wiretap chapter was to limit the use of information gained from wiretaps, as is clearly reflected in the congressional scheme which concerned itself directly with the right of privacy. Gelbard v. United States, 408 U.S. 41, 48.[1] Accordingly, in the instant case, the intentional violation of the congressional scheme mandates the invocation of both the statutory and judicially fashioned exclusionary rule, for there was no compliance with the provisions of 18 U.S.C. 2517.

---

1. Gelbard is significant for it stands for the proposition that notwithstanding whatever general legal principle may apply to a given factual situation, the wiretap statute has preempted these normal legal principles and a different judicial decision may result because of the peculiarities of the wiretap chapter. That is why United States v. Calendra, 414 U.S. 338, is reconciliable with Gelbard.

4. The Government concludes that the amendment of 18 U.S.C. 2517(3), which expanded the disclosure of wiretap evidence to "any proceeding," indicates congressional intent to permit its use in civil tax proceedings.

In 1970, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was amended by the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 941. The amendment, which is conspicuously placed under Title IX, "Racketeer Influenced and Corrupt Organizations," is directed to preventing the influx of organized crime and its money into legitimate business. [1970] U.S. Code Cong. & Ad. News, 4010. In particular, the legislative history contains an extensive discussion concerning the use of civil proceedings (much akin to that developed in the anti-trust field) to prevent the infiltration of legitimate business by organized crime, which was

intended to be limited to orders of divestment, dissolutions and reorganizations relating to racketeering activities. Nowhere in the legislative history is there any discussion that suggests wiretap information could be used to determine civil tax liability. S.Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969).

5. Finally, the Government's reliance upon United States v. Janis, 428 U.S. 433, is misplaced. In Janis, the Court found no deterrent to the exclusion of evidence by forbidding a different sovereign from using tainted evidence in a civil proceeding "where there was no responsibility or duty to or agreement with the sovereign seeking to use the evidence."

By contrast, the Government in footnote 1 has acknowledged a duty on the part of both the FBI and IRS special agents, under the pertinent provisions of 18 U.S.C.

2517(2), to release information for civil tax purposes to a non-investigative or law enforcement officer who incidentally works for the same sovereign. Accordingly, Janis is inapposite.[2]

The importance and substantiality of the questions presented have not been denied. In light of the inability of the Government to face the issue presented in the petition without grossly distorting the record, the need for plenary review of the action is indisputable.

Respectfully submitted,

WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

STEPHEN E. SILVER
P. O. Box 13528
Phoenix, Arizona 85002

August 1977 COUNSEL FOR PETITIONER

---

2. The Janis opinion specifically recognized that the case would have been different if there had been an agreement between federal and local officials. 428 U.S., at 455, n. 31.

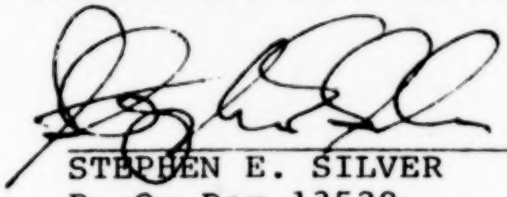
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 1977, three (3) copies of the Petitioner's Reply Memorandum were mailed, postage prepaid, to:

Wade Hampton McCree, Jr.
The Solicitor General
Department of Justice
Constitution Avenue
Washington, D. C. 20530

Counsel for Respondent

I further certify that all parties required to be served have been served.



STEPHEN E. SILVER
P. O. Box 13528
Phoenix, Arizona 85002

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	
versus	)	CR # [5640]
ROBERT W. BEST, ET AL,	)	
DEFENDANTS	)	

Transcript of Agent Edward Collins' statement taken during the change of plea of Mr. Robert W. Best in United States District Court before the Honorable Anthony A. Alaimo in Augusta, Georgia.

APPEARANCES:

FOR THE PLAINTIFF: R. JACKSON B.SMITH, JR.
United States
District Attorney
Department of Justice
Federal Courthouse
Building
Augusta, Georgia
30903

FOR THE DEFENDANT: JOHN C. CALHOUN
Attorney at Law
Southern Finance
Building
Augusta, Georgia

MR. COLLINS: Edward D. Collins, I'm a special agent with the F.B.I.

THE COURT: Would you wait just a moment, Mr. Best? All right, go ahead, Mr. Collins. Mr. Best, I want you to turn around and listen to this, though. All right, Mr. Collins.

MR. COLLINS: May it please the Court, Your Honor, after this Omnibus Crime Bill was passed by Congress, the effective date October 15, 1970, the F.B.I. conducted an investigation on the Augusta lottery; and in this investigation, we developed information that there were five or more persons, and they were bringing in between an average of five thousand - between five and six thousand dollars a day. We established a sort of surveillance on them

from a period of July 10th to November 10th when we searched some of their--twenty-two of their locations and found that they were in continuous operation during this time. Our investigation showed that Mr. Best -- Defendant Best's telephone at his home was being used by one of the telephone operators from prior to -- well, we found out September 29th up to approximately October 5th. We also found that in searching these twenty-two locations on November 10th, we seized twenty-seven adding machines, all but a couple of them were purchased by Mr. Best, and they had been serviced under his name, under an account doing business as "C.C. Cash." Also, because our standard techniques were not working out in this investigation, we requested and obtained authority to intercept some of their phone conversations. And in these conversations, we found that

Defendant Best was more-or-less operating and supervising the whole operation. He was dealing with Defendant Kinard in recruiting personnel; docking their wages when they took off sick; as far as pay; vacation pay; time off. One of the telephone relay operators got a jury summons, and the Controller, Defendant Kinard -- we refer to him as the Controller, Defendant Kinard called him and said he was going to have the man out, and Mr. Best called a local judge to have the man excused from jury. There was many things like this all the way through to indicate that he was heading up this numbers operation.

THE COURT: All right, sir. Any questions you desire to ask Mr. Collins?

MR. CALHOUN: No questions.

THE COURT: Mr. Best, any questions you desire to ask of Mr. Collins? Did you

understand me, sir? Any questions you want to ask him?

MR. BEST: Yes, sir, I want to ask him one question.

THE COURT: All right, sir.

MR. BEST: In all of your surveillance or whatever you call it, did you ever catch me or find out or know of any of your men that I was around and in the operation?

MR. COLLINS: Well, no. When we followed you -- Mr. Best would leave his home and come to the Johnson Building, and Defendant J. B. Palmer was sort of his chauffeur, but we did not actually see him receive the money or do anything that we could connect with the gambling operations. The things we found on him was the fact that the phones that were seized throughout the city and the county were purchased by him and repaired by him

and - through J. B. Palmer and the fact that his one phone at his home was used as a telephone relay by Defendant Kinard for a short period. But as far as seeing him, no, sir.

THE COURT: All right, sir.

END OF AGENT COLLINS' STATEMENT.

CERTIFICATE

I hereby certify that the foregoing four pages of typewritten material were taken down by me, transcribed under my supervision, have been proofread by me, and are true and correct to the best of my ability;

I further certify that I am a disinterested party to this action and am neither kin nor counsel to any of the parties hereto;

This 9th day of August, 1977.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

IN THE MATTER OF AN	)	
	)	
APPLICATION FOR AN ORDER	)	CRIMINAL
	)	ACTION
AUTHORIZING USE OF	)	NO. 5640
	)	
INTERCEPTED WIRE COMMUNICATIONS	)	

A P P L I C A T I O N

Comes now R. Jackson B. Smith, Jr., United States Attorney for the Southern District of Georgia, and being duly sworn deposes and says:

This sworn application is submitted for an Order pursuant to Title 18, U.S.C. §2517(5) authorizing the use, pursuant to the provisions of Title 18, U.S.C. §2517(5) in any proceeding held under the authority of the United States or of any state or political subdivision thereof, of the contents and any evidence derived therefrom of

wire communications intercepted by an investigator or law enforcement officer in a manner authorized by Chapter 119, Title 18, United States Code, which relate to offenses other than those specified in the interception orders.

1. He is an "investigative or law enforcement officer--of the United States" within the meaning of Title 18, U.S.C., §2510(7) -- that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Title 18, U.S.C., §2516.

2. Pursuant to the powers conferred on him by Title 18, U.S.C., §2516, the Attorney General of the United States, the Honorable Richard G. Kleindienst, authorized an application for interception orders on two separate occasions.

3. On September 29, 1972, upon application of R. Jackson B. Smith, Jr., United

States Attorney, Southern District of Georgia, an order was issued by the Honorable Anthony A. Alaimo, Judge, United States District Court for the Southern District of Georgia, authorizing agents of the Federal Bureau of Investigation to intercept for a period of 15 days wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 722-2468	Floyd Henderson 1461 Chestnut Street Augusta, Georgia
(404) 736-2609	Furman Devilius Kinard,Jr. 2418 Forest Park Road Augusta, Georgia

And, on October 20, 1972,upon application of R. Jackson B. Smith, Jr., United States Attorney, Southern District of Georgia, an order was issued by the Honorable Alexander A. Lawrence, Chief Judge, United States District Court, Southern District of Georgia, authorizing agents of the Federal Bureau

of Investigation to intercept for a period of 15 days wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 733-9578	Bob Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 733-6344	R. W. Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 722-6303	R. W. Best Room 23, 203 8th Street Augusta, Georgia
(404) 722-3998	Bruno Ward Janitorial 842 Greene Street Augusta, Georgia
(404) 798-2944	Frances Marian Seago 2128 Circle Drive (formerly Circular Drive) Augusta, Georgia
(404) 798-0535	Frances Marian Seago 2128 Circle Drive (formerly Circular Drive) Augusta, Georgia
(404) 736-5700	David Chambers 1219 1/2 Reid Road Augusta, Georgia

(404) 736-7188 James A. Bagley
847 Lake Terrace
Drive
Augusta, Georgia

for the purpose of securing evidence that the above-named persons were committing offenses specified in Title 18, U.S.C., §2516, to wit: Offenses involving violations of Title 18, U.S.C., §1955 and §371. A copy of the order along with each application is attached hereto as Exhibit A and incorporated herein by reference.

4. The interception was commenced pursuant to the interception order of September 29, 1972, and terminated on October 16, 1972, in accordance with the provisions of the order.

The interception was commenced pursuant to the interception order of October 20, 1972, and terminated on November 8, 1972, in accordance with the provisions of the order.

5. During the authorized periods of interception, wire communications were intercepted which, when considered together with other evidence subsequently obtained, gave indications that Robert W. Best and others were committing offenses in violation of Title 26 of the Criminal Code of the State of Georgia, Ga. Code Ann. §26-2301.

6. At the time of the application for interception orders, neither the applicant nor agents of the Federal Bureau of Investigation had knowledge of facts sufficient to establish probable cause that the above subjects were violating Title 26 of the Criminal Code of the State of Georgia, Ga. Code Ann. §26-2301.

7. Pursuant to the powers conferred on him by Title 18, U.S.C. §2516, the Attorney General of the United States, the Honorable William B. Saxbe, has authorized this

Walter C. DeLoach
Official Court Reporter
Southern District of Georgia
P. O. Box 552
Augusta, Georgia 30903

application to be made. There is attached hereto as Exhibit B evidence of that authorization.

On the basis of the allegations contained in this application, affiant requests the Court to issue an Order pursuant to Title 18, U.S.C., §2517(5), authorizing the use of the contents of the intercepted wire communications regarding the violation set forth in paragraph 5 above by those persons whose names are set out in paragraph 5 above, in any proceeding held under the authority of the United States of any state or political subdivision thereof, as provided by Title 18, U.S.C. §2517(3).

/s/
R. JACKSON B. SMITH, JR.
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF GEORGIA

SUBSCRIBED and SWORN to before this
14th day of February, 1974

/s/ Elizabeth C. Calhoun
(Notary Public)
My Commission Expires August 9, 1975